Supreme Court, U.S.
FILED
FEB 6 2001
CLERK

(3)

No. 00-963

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

FREDERICK A. LAKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

5 pp

In the Supreme Court of the United States

No. 00-963

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

FREDERICK A. LAKE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent agrees that the petition for a writ of certiorari in this case should be held pending the Court's decision in *Nguyen* v. *INS*, No. 99-2071 (argued Jan. 9, 2001). Respondent disagrees with us, however, regarding the appropriate disposition of the petition if the Court's decision in *Nguyen* fails to resolve the constitutional challenge to 8 U.S.C. 1409(a) in a manner that controls this case. As we have fully explained in the pending petition and reply brief in *United States* v. *Ahumada-Aguilar*, No. 99-1872 (filed May 22, 2000), which also involves a constitutional challenge to Section 1409(a) and raises a threshold issue of standing similar to the one in this case, an appropriate disposition in that

circumstance would be summary reversal of the decision of the court of appeals.

1. Our petition shows (at 10-11), and respondent agrees (Br. in Opp. 4-5), that the petition should be held pending this Court's disposition of *Nguyen*. With respect to that issue, we note only that we did *not* suggest that if the Court were to hold that the petitioner in *Nguyen* is entitled to citizenship, "then the Government would be estopped from urging a different result" in this case. Br. in Opp. 5.[1] Whether there would be any material distinctions between this case and *Nguyen* in that event could only be determined in light of such a decision in *Nguyen*.

2. As noted in the petition (at 11), we have addressed the third-party standing issue presented by this case in our certiorari petition (at 10-15) and reply brief (at 2-8) in *Ahumada-Aguilar*. We explain in *Ahumada-Aguilar* that the purpose of the "hindrance" requirement for third-party standing is to identify situations in which the third party's "absence from a suit more likely stems from disability than from disinterest," and there are concrete grounds to presume "that the rightholder did not simply decline to bring the claim on his own behalf." *Miller* v. *Albright*, 523 U.S. 420, 450 (1998) (O'Connor, J., concurring in the judgment). In this case, respondent was born in 1953 and his father died in 1997. Pet. App. 2a-3a. Respondent's father had 44 years in which to assert his equal protection rights with respect to the transmission of

---

[1] To the contrary, we specifically adverted to the possibility that the Court's decision in *Nguyen* could "fail[] to resolve the merits of the constitutional issue in a manner that controls the decision of the constitutional issue in this case." Pet. 11-12.

citizenship to his son.[2] During the first 18 of those years, respondent's father had only to comply with the requirements of Section 1409(a) to secure citizenship for his son. And, during the last six of those years, after respondent's armed robbery conviction in 1991, it was clear that successful assertion of a claim to United States citizenship on behalf of respondent would have insulated respondent from deportation as a result of the conviction. See 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) (formerly codified at 8 U.S.C. 1251(a)(2)(A)(iii) (1994)). In light of the failure of respondent's father, during all that time, to take any action to secure citizenship for his son, it is pure speculation to suggest that respondent's father would have brought a constitutional challenge on his own behalf if he were still alive.

Hodel v. *Irving*, 481 U.S. 704 (1987), does not support respondent. As explained in our reply brief in *Ahumada-Aguilar* (at 6-7 & n.6), the claimed constitutional deprivation in *Irving* resulted from a statute that affected the disposition of the rightholder's property after death. See 481 U.S. at 709-712. It was appropriate to treat the rightholder's death as a "hindrance" for purposes of third-party standing in that situation because the rightholder suffered concrete injury only at the time of death. In this case, by contrast, respondent's own theory is that his father suffered an actionable deprivation of equal protection rights that began with respondent's birth and continued until the father's death 44 years later. Respondent points to no hindrance to his father's assertion of his rights during that time. As in *Ahumada-Aguilar*, the

---

[2] Respondent did not come to the United States as a lawful permanent resident until 1987, when he was 33 years old. Pet. App. 2a; see Br. in Opp. 7.

death of respondent's father under the particular circumstances presented does not give rise to any reasonable inference that the father's failure to sue "more likely stems from disability than from disinterest." 523 U.S. at 450 (O'Connor, J., concurring in the judgment).

* * * * *

The petition for a writ of certiorari should be held pending this Court's disposition of *Nguyen* v. *INS*, No. 99-2071, and disposed of in accordance with the Court's decision in that case. In the alternative, the Court may wish to consider summary reversal of the court of appeals' decision in this case.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

FEBRUARY 2001